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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/519,637	12/28/2004	Rodney W. Tyler	1030-018	9141

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EXAMINER

SAFAVI, MICHAEL

ART UNIT PAPER NUMBER

3673

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	02/27/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

Office Action Summary	Application No. 10/519,637	Applicant(s) TYLER, RODNEY W.	
	Examiner M. Safavi	Art Unit 3673	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 29 November 2006.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-198 is/are pending in the application.
- 4a) Of the above claim(s) 121 and 176-198 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-120 and 122-175 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date <u>10/24/06</u> . | 6) <input type="checkbox"/> Other: _____ |

Applicant's election without traverse of the invention of Group I, (claims 1-175), in the reply filed on November 29, 2006 is acknowledged.

Claims 176-198 are withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected invention, there being no allowable generic or linking claim. Election was made **without** traverse in the reply filed on November 29, 2006.

Applicant's election with traverse of each respectively elected species in the reply filed on November 29, 2006 is acknowledged. Applicant has elected the species of "pea gravel filling", the species of "knitted tubular mesh enclosure", the species of seeds as filling supplement, the species of "hose within the tubular mesh enclosure", the species of application to a roof, the species of blower mode of filling, the species of gathering by palletizing, and the species of "filled subsequent to placing the tubular mesh in-situ". The traversal is on the ground(s) that all of the species possess the same special technical feature. This is not found persuasive because the feature of "a second tubular mesh enclosure attached to said first tubular mesh enclosure" does not form a special technical feature of the listed species. In any event each of the species within each listed Group of species is directed to a different special technical feature as each species is mutually exclusive from all other listed species within a respective Group, (e.g., an irrigation hose adjacent a tubular mesh enclosure does not read upon an embodiment of an irrigation hose within a tubular mesh enclosure).

The requirement is still deemed proper and is therefore made FINAL.

Claim 121 is withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to a nonelected species of the invention, there being no allowable generic or linking claim. Applicant timely traversed the restriction (election) requirement in the reply filed on November 29, 2006.

In view of the amendment filed November 27, 2006, claims 1-120 and 122-175 will be examined at this time.

Drawings

The drawings are objected to under 37 CFR 1.83(a). The drawings must show every feature of the invention specified in the claims. Therefore, the "inserting an attachment...", (claims 138 and 139), as well as the "withdrawing a hose...", (claim 141), must be shown or the feature(s) canceled from the claim(s). No new matter should be entered.

Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be labeled as "amended." If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency. Additional replacement sheets may be necessary to show the renumbering

of the remaining figures. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either "Replacement Sheet" or "New Sheet" pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

Claim Rejections - 35 USC § 112

Claims 10, 119, 122, and 162-164 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 10, it is not clear as to what is being defined by "a second tubular mesh enclosure stacked above said first tubular mesh enclosure". Claim 1, from which claim 10 depends, already presents a "second tubular mesh enclosure". Would the second tubular mesh enclosure recited in claim 10 be the same as that introduced within claim 1?

Claim 119, it is not clear as to what is being defined by "said system defining a length and a longitudinal cross-section defining a major width, a ratio of said length to said major width greater than approximately 40". How does the "system" define a length or a major width? It is not clear as to what the "system" is. In other words, it is not clear as to what element possesses a length and width.

Claim 122, lines 5 and 6-7, "said first tubular mesh enclosure" lacks appropriate antecedent basis within the claim. Applicant should amend line 2 of claim 122 to

Art Unit: 3673

introduce a first tubular mesh enclosure. Lines 8-10, it is not clear as to what is being defined by "said system defining a length and a longitudinal cross-section defining a major width, a ratio of said length to said major width greater than approximately 40". How does the "system" define a length or a major width? It is not clear as to what the "system" is. In other words, it is not clear as to what element possesses a length and width.

Claim 162, it is not clear as to how "the first tubular mesh enclosure is placed such that said opposing pair of ends are adjacent each other" when a second tubular mesh enclosure is attached to the first tubular mesh enclosure.

Claim 163, it is not clear as to what is being defined by "the first tubular mesh enclosure is placed substantially perpendicular to another tubular mesh enclosure". Would the "another tubular mesh enclosure" recited in claim 163 be the same as the "second tubular mesh enclosure" introduced within claim 124?

Claim 164, it is not clear as to what is being defined by "the first tubular mesh enclosure is placed substantially perpendicular to another tubular mesh enclosure". Would the "another tubular mesh enclosure" recited in claim 163 be the same as the "second tubular mesh enclosure" introduced within claim 124?

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

Art Unit: 3673

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claim 120 is rejected under 35 U.S.C. 102(b) as being anticipated by Houck et al. '123. Houck et al. '123 discloses, Fig. 2, a first tubular mesh enclosure 20 formed from a mesh material 22; a filling 21 surrounded by said first tubular mesh enclosure; a second tubular mesh enclosure 20 attached to said first tubular mesh enclosure; and an irrigation hose 10 surrounded by said filling.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claim 119 is provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-84 of copending Application No. 10/208,631 in view of Houck et al. '123. The invention defined by claims 1-84, (particularly claim 1), possesses the elements and features of instant claim 119 with the exception of "an irrigation hose surrounded by said filling". However, Houck et al. teaches application of an irrigation hose surrounded by a filling within a mesh enclosure. Therefore, to have provided the invention of claims 1-84 of copending Application No. 10/208,631 with an irrigation hose surrounded by a filling within a mesh enclosure, thus allowing for a more streamline irrigation or drainage, would have been obvious to one having ordinary skill in the art at the time the invention was made as taught by Houck et al. '123.

This is a provisional obviousness-type double patenting rejection.

Claims 1-118 and 122-175 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-84 113, and 114 of copending Application No. 10/208,631. Although the conflicting claims are not identical, they are not patentably distinct from each other because: as to instant claim 1, it would have been obvious to one having ordinary skill in the art to consider a "first major diameter" as a "first major width" as well as consider a "generally oval cross-section" as a "generally non-circular longitudinal cross-section". As to instant claim 122,

Art Unit: 3673

it would have been obvious to one having ordinary skill in the art to consider a "first major diameter" as a "major width" as well as consider a "generally oval cross-section" as a "longitudinal cross-section". As to instant claims 123 and 124, it would have been obvious to one having ordinary skill in the art to provide the mesh enclosure of claims 113 and 114 in application 10/208,631 to or in any area including a predetermined area as "predetermined area" would serve to read upon any area including that area within which the mesh enclosure is formed. As to instant claims 174 and 175, it would have been obvious to one having ordinary skill in the art to provide the first recited tubular mesh enclosure of claims 113 and 114 in application 10/208,631 as a "first tubular mesh enclosure".

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to M. Safavi whose telephone number is (571) 272-7046. The examiner can normally be reached on Mon.-Thur., 8:30-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Patricia Engle can be reached on (571) 272-6660. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

M. Safavi
February 15, 2007



MICHAEL SAFAVI
PRIMARY EXAMINER
ART UNIT 3673